IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2382 OF 2004

Gurunath J. Gadge ....Petitioner.

V/s

State of Maharashtra & Anr ....Respondent.

Mr. V.B. Ghorpade for the petitioner.
Mr. R.Y. Mirza, APP for the State.
Mr. M.S. Gyani for respondent No.2.

CORAM: V.M. KANADE, J.

DATE: 6th March, 2006

P.C.

1. Heard the learned Counsel for the petitioner, the learned APP for the State and the learned Counsel for respondent No.2.

2. Petitioner is the original accused in a complaint which was filed against him by respondent No.2 in the Court of Metropolitan Magistrate under section 138 of the Negotiable instruments Act. The process was issued by the learned Magistrate on 17/4/2003.

3. The complainant, being aggrieved by the order passed by the Magistrate issuing process only under section 138, filed Revision Application before the

Sessions Court praying that the directions may be given to the Magistrate to issue process under section 420 also. The Sessions Court, in revision, set aside the order dated 17/4/2003 and directed the Metropolitan Magistrate to hear the complainant and his advocate on the point of issuance of process and then to pass a reasoned order if it was not inclined to issue process under section 420 read with section 34 of the Indian Penal Code besides the process being issued under section 138 of the Negotiable Instruments Act. The petitioner was directed to appear in the Court of Metropolitan Magistrate on the date fixed in the trial court.

4. The accused being aggrieved by the said order has preferred this Writ Petition in this Court. It is the contention of the petitioner that he had filed a discharge application in the Court of Metropolitan Magistrate and the said discharge application is still pending and was not decided. It is submitted that the trial court erred in setting aside the process which was issued on 17/4/2003 and remanding the matter back for the purpose of consideration as to whether the process should be issued under section 420. It is submitted that the trial court had correctly issued process on 17/4/2003 after examining all documents.

5. It is not possible to accept the submissions made by the learned Counsel appearing for the petitioner. So far as the discharge application which was filed by the present petitioner is concerned, it does not survive firstly because the order of issuance of process dated 17/4/2003 itself was set aside by the Sessions Court. Even otherwise, in view of the judgment in the case of Adalat Prasad Vs. Rooplal Jindal and Ors. reported in 2004(4) Mh.L.J. 274, the Magistrate is not empowered to consider his own order of issuance of process. So far as the order which is passed by the Revisional Court is concerned, in my view, no case is made out for interfering with the said order as there is no error of law committed by the Sessions Court. The Sessions Court merely has directed the Magistrate to consider the application of the complainant for issuance of process under section 420 over and above the issuance of process under section 138 and if the Magistrate is inclined to issue process under section 420 then, in that case, to pass a reasoned order. The petitioner, therefore, cannot be aggrieved by the said order since the Sessions Court has merely directed the Magistrate to consider the submissions of the complainant and thereafter pass a reasoned order.

6. So far as the other remedies of the petitioner are concerned for challenging the order of process, it is open for him to pursue such remedies as are available to him in accordance with law. With these directions, Writ Petition is rejected. In view of this order, Criminal Application No.57 of 2006 does not survive and the same is disposed of accordingly.

V.M. KANADE, J.